CLERK'S COPY.

744456
Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 3, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1301

THE CONFEDERATED BANDS OF UTE INDIANS, PETITIONERS,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit "A"—Jurisdictional Act of June 28, 1938	7	5
Exhibit "B"—Act of July 15, 1941, amending Jurisdictional Act	12	10
General traverse	13	10
Argument and submission of case	13	11
Special findings of fact	15	11
Conclusion of law	27	24
Opinion of the court by Whitaker, J.	27	24
Concurring opinion by Littleton, J.	32	28
Judgment	43	38
Clerk's certificate (omitted in printing)	45	
Order allowing certiorari	46	38

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 6, 1946.

—5046

[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

THE CONFEDERATED BANDS OF UTE INDIANS, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant

PETITION—Filed December 9, 1942

2. *Lands Vested in Plaintiff Pursuant to Treaty of 1868 and Executive Order of November 22, 1875, Taken From Plaintiff by Executive Order of August 4, 1882*

To the Honorable the Chief Justice and the Associate Judges of the Court of Claims:

Plaintiffs, the Confederated Bands of Ute Indians, respectfully represent:

1. Plaintiffs are a confederation of the Uncompahgre (sometimes designated as Tabeguache), White River [fol. 2] (sometimes designated as Yampa and Grand River), Southern and Ute Mountain Ute (which at the time of the agreement of March 6, 1880, hereinafter referred to, were jointly referred to as Southern Utes, and sometimes designated as Capote, Muache, and Weeminuche) Bands of Ute Indians, who were parties to an agreement of March 6, 1880, with the United States, ratified by Act of Congress of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180.

2. Plaintiffs file this petition under and pursuant to the Act of June 28, 1938, c. 776, 52 Stat. 1209, a copy of which is attached hereto and made a part hereof as Exhibit A, as amended by Act of July 15, 1941, c. —, — Stat. —, a copy of which is attached hereto and made a part hereof as Exhibit B.

3. Plaintiffs (except Southern Utes and Ute Mountain Utes), under agreements approved in accordance with existing law by the Secretary of the Interior on October 8, 1932, retained Raymond T. Bonnin to prosecute all claims of the Ute Indians; said agreements were, by approval of the Secretary of the Interior on February 13, 1935, assigned to Hughes, Schurman, and Dwight, who engaged

Ernest L. Wilkinson to assist them in the prosecution of the claims covered thereby; subsequently said agreements were, by approval of the Secretary of the Interior of March 31, 1938, assigned by Hughes, Schurman, and Dwight, in liquidation, to Ernest L. Wilkinson. Thereafter all the plaintiffs, under agreements approved in accordance with existing law by the Secretary of the Interior on January 17, 1939, directly retained Ernest L. Wilkinson to prosecute all claims of the Ute Indians.

4. No action has been taken by Congress or any other department of the Government with respect to the claim herein alleged, except in connection with the enactment [fol. 3] of the Act of June 28, 1938, and the amendatory Act of June 15, 1941, referred to in paragraph 1 hereof (Exhibits A and B attached hereto). Plaintiffs are and always have been the sole and absolute owners of the claim alleged in this petition; no person other than the plaintiffs has ever had any interest therein. No assignment or transfer of the claim alleged in this petition or any part thereof, or of any interest therein, has been made. Plaintiffs have not been paid for the claim herein made, or any part thereof, and are justly entitled to recover upon the claim herein made from the United States after allowing all just credits and offsets. Plaintiffs have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

5. By Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, a reservation was established for plaintiffs and the Uintah Utes in the Territory of Colorado, bounded by the 107th meridian on the east, the southern boundary of Colorado on the south, the western boundary of Colorado on the west, and a line fifteen miles north of the 40th parallel of north latitude on the north. It was agreed that the President might at any time order a survey of the reservation.

6. The northern line of the aforesaid reservation was not surveyed until about seven years after the date of the Treaty of 1868. At about the time the survey of the north line of the reservation was completed, certain lands lying between the north boundary of the reservation de-

scribed by the Treaty of 1868 and the first standard parallel north were by means of Executive order of November 22, 1875, 1 Kappler 834, set apart by the President of the United States for the use of the several tribes of [fol. 4] Ute Indians as a part of the reservation described in paragraph 5 hereof.

7. By agreement between plaintiffs and defendant of March 6, 1880, which was amended, ratified and confirmed by Act of Congress of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180 (amended by Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205), plaintiffs undertook to cede to the United States all their then reservation in Colorado (which included the territory added to the 1868 reservation by the Executive Order referred to in paragraph 7 hereof), except certain lands to be retained for their use. Defendant undertook to sell all lands not retained for the use of plaintiff, and, after certain stipulated payments, deposit the proceeds in the Treasury of defendant for the benefit of plaintiffs. The aforesaid agreement was ratified and approved by three-fourths of the adult male Indians of the Confederated Bands of Utes within the time limit fixed by Section 10 of said Act of June 15, 1880.

8. Notwithstanding the duty of defendant, under the agreement of 1880 referred to in paragraph 7 hereof, to hold for sale for plaintiffs' use, benefit and account the lands added to plaintiffs' reservation by the Executive order of 1875, cited in paragraph 6 hereof, the President of the United States, by Executive order of August 4, 1882, 1 Kappler 834, ordered the said lands restored to the public domain. Plaintiffs believe and therefore aver that defendant has failed ever to account to plaintiffs for the proceeds of said lands; has never paid into the Treasury of the United States the proceeds of sale of said lands as provided in the said agreement of 1880 or under the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205; but, on the contrary, under the aforesaid Executive order of 1882, has taken and appropriated said lands to [fol. 5] its own use and benefit free from the trust restrictions imposed by said agreement.

9. Plaintiffs make no claim herein for other appropriations of lands or funds of plaintiffs or any of them, than

as to lands added to plaintiffs' reservation under the Executive order of November 22, 1875, hereinabove described. Plaintiffs reserve the right, as separate bands and jointly, to file a suit or suits as respects any other claims which they, or any of them, have against the United States. Plaintiffs, by this petition, ask only for damages for lands forming a part of their reservation under Executive order of November 22, 1875, and taken by defendant under the Executive order of August 4, 1882, as set forth in paragraph 8 hereof, and do not include within this petition claim for any other lands taken by the Executive order of August 4, 1882; and this claim is pleaded separately as authorized by section 2 of said Act.

10. By virtue of the aforesaid taking and appropriation by defendant of the aforesaid lands, plaintiffs have a right of action against defendant for (a) the minimum price at which defendant, under the aforesaid agreement of March 6, 1880, agreed to sell and dispose of such land, or (b) the value of such land, whichever is the greater.

11. Wherefore plaintiffs pray that defendant make a full and true discovery and disclosure of the acreage forming a part of their reservation under the Executive order of November 22, 1875, and taken and appropriated to its own use under the aforesaid Executive order of August 4, 1882, and render a complete and accurate account thereof and of all relevant facts connected therewith; and that defendant be adjudged liable to plaintiffs for such taking and appropriation, in such amount as upon a complete and accurate accounting this Court may find due and owing [fol. 6] to the plaintiffs as reasonable and just compensation, but in no event less than the minimum price at which defendant had agreed to sell such lands.

Ernest L. Wilkinson, Attorney for Plaintiff, 1109 Earle Building, Washington, D. C.

DISTRICT OF COLUMBIA, SS:

Ernest L. Wilkinson, being duly sworn, deposes and says:

That this suit is filed pursuant to the authority conferred on Ernest L. Wilkinson by agreements with plaintiffs detailed in paragraph 3 of the foregoing petition; that certified copies of said agreements have been lodged with the Clerk of this Court; that he makes this verification for and

on behalf of plaintiffs pursuant to Section 2 of the Act of June 28, 1938, under which this suit is prosecuted; that he has read the foregoing petition and that the statements made therein are true to the best of his knowledge, information and belief.

Ernest L. Wilkinson.

Subscribed and sworn to before me this 9th day of December, 1942. Anna A. Hammond, Notary Public, District of Columbia. My commission expires June 1, 1943. (Seal.)

[fol. 7] EXHIBIT "A" TO PETITION

Jurisdictional Act of June 28, 1938, c. 776, 52 Stat. 1209

An Act

Conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any Tribe or Band thereof may have against the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the United States Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent[1] band thereof, may have against the United States, including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the failure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United

---

[1] So in original.

States, or any misfeasance or nonfeasance on the part of the United States with respect thereto, or otherwise.

Sec. 2. Suit or suits under this Act may be instituted by any of the aforesaid bands of Indians (each band to have the right to sue for constituent bands comprising said band), either separately or jointly, as party or parties plaintiff against the United States as party defendant, by filing within five years of the enactment of this Act its or their petition or petitions in the Court of Claims and [fol. 8] serving with respect to each suit, a copy thereof on the Attorney General of the United States who, either in person or by some attorney from the Department of Justice to be designated by him, shall appear and defend the interest of the United States. Such petition or petitions shall set forth the facts on which the claim or claims for recovery is or are based and shall be verified by the attorney or attorneys employed by said band or bands of Ute Indians, under contracts approved in accordance with existing law, to prosecute said claims, which may be made upon information and belief, and no other verification shall be necessary. The petition or petitions shall be subject to amendment at any time prior to final submission of the case to the Court of Claims. Such petition or petitions may, in addition to alleging specific claims, demand a general accounting of all funds and property expended or used by the United States for it or their account, in which event the General Accounting Office or its successor shall within a reasonable time from the time of filing said petition make a complete audit of said accounts and, in addition to the usual copies for the Attorney General, shall deliver a copy thereof to the Secretary of the Interior, and the court, after a full hearing, shall state the account, and render judgment in accordance therewith.

Sec. 3. At the trial of any suit instituted hereunder the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights therein, both legal and equitable, of said bands of Ute Indians against the United States, notwithstanding lapse of time or statutes of limitation. In the determination of the validity of any claim asserted or defense interposed hereunder, the Court shall have the full power and authority of a court of equity.

Sec. 4. The court shall have authority, by proper orders and process, to make parties to any suit or suits instituted hereunder any other tribe, band, or group of Indians deemed by it necessary or proper to a final determination of the matters in controversy.

[fol. 9] Sec. 5. No payment or payments which have been made by the United States upon or in satisfaction of any claim or claims asserted in any suit brought hereunder or expended for any of the aforesaid bands of Ute Indians or members thereof shall apply as an estoppel against any suit brought hereunder, but there shall be set off against any recovery obtained by any band of said Indians hereunder, any payment made by the United States on any claim asserted by said band and such gratuity expenditures made by the United States for the benefit of said band as are directed to be set off by the Second Deficiency Appropriation Act, fiscal year 1935 (Public, Numbered 270,[1] Seventy-fourth Congress).

Sec. 6. If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and set apart and reserved as national reservations or for other public uses or otherwise classified, reserved, or withdrawn from entry and sale under the public land laws or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources, anything in any other Acts of Congress to the contrary notwithstanding, no lands in Colorado north of and including range 35 formerly owned or claimed by the Ute Indians or any band thereof shall be restored to tribal ownership under the provisions of section 3 of the Act of June 18, 1934 (48 Stat. 984), and said lands to the extent that they have not been disposed of by the United States are hereby declared to be the absolute property of the United States: *Provided*, That there is hereby added to the exist-

[1] So in original.

ing Southern Ute Indian Reservation in tribal ownership of the vacant, undisposed of ceded lands within the following described boundaries:

[fol. 10] Beginning at a point on the western boundary line of the State of Colorado, being the northwest corner of the existing Southern Ute Indian Reservation; thence north to the township line separating townships 34 and 35 north, range 20 west; thence east along said township line to the southwest corner of section 35, township 35 north, range 19 west; thence north to the northwest corner of section 2, township 35 north, range 19 west; thence east to the northeast corner of section 1, township 35 north, range 18 west; thence north to the northwest corner of section 31, township 36 north, range 17 west; thence east to the northeast corner of section 35, township 36 north, range 17 west; thence south to the north boundary of the existing Southern Ute Indian Reservation; thence west along the north boundary of the said reservation to the west line of section 9, township 34 north, range 17 west; thence north to the northwest corner of section 21, township 35 north, range 17 west; thence west to the southwest corner of section 17, township 35 north, range 17 west; thence south to the southeast corner of the northeast quarter of the northeast quarter of section 19, township 35 north, range 17 west; thence west to the southwest corner of the northeast quarter of the northwest quarter of said section 19; thence north to the north line of said section 19; thence west to the southwest corner of section 17, township 35 north, range 18 west; thence south to the north boundary of the Southern Ute Indian Reservation in section 7, township 34 north, range 18, all west of the New Mexico principal meridian; thence west along the said north boundary to the point of beginning: *Provided further*, That any orders restoring or attempting to restore to tribal ownership any portion of the lands in Colorado north of range 35 are hereby rescinded and annulled.

Sec. 7. In any suit instituted hereunder, any letter, paper, document, map, or record in the possession of any officer or department of the United States (or certified copy thereof) may be used in evidence, and the departments of the Government of the United States shall give full and free access to the attorneys for any of said bands of Indians to such letters, papers, documents, or records as may be useful to said attorney or attorneys in the preparation

[fol. 11] for trial or trials of such suits and shall afford facilities for the examination of the same.

Sec. 8. Upon the final determination of any suit, cause, or action instituted hereunder, whether by judgment, compromise, or otherwise, the Court of Claims, in the event of success by any plaintiff, or in the event any claim asserted by any of said bands of Indians shall be compromised or settled without the institution of any suit hereunder, the Secretary of the Interior, shall decree that there shall be paid to the attorney or attorneys employed therein by said plaintiff under contracts negotiated or entered into as provided by existing law, such fees as, based upon a quantum meruit, it or he shall find reasonable, and in addition such actual and necessary expenses incurred by the attorney or attorneys in preparation and prosecution of said claims. In no case shall the fees decreed by said Court of Claims and/or by the Secretary of the Interior be in excess of the amount stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and in no event to exceed 10 per centum of the amount of the recovery, and shall be paid upon money being appropriated for the benefit of any bands of Ute Indians pursuant to any judgment or settlement hereunder whether distributable thereto or not.

Sec. 9. The net amount of any judgment recovered shall be placed in the Treasury of the United States to the credit of said Indians and shall draw interest at the rate of 4 per centum per annum from date of judgment or settlement and shall, thereafter, be subject to appropriation by Congress for the benefit of said Indians, including the purchase of lands and building homes, and no part of said judgment, without further legislation, shall be paid out in per-capita payments to said Indians.

Approved, June 28, 1938.

[fol. 12] EXHIBIT "B" TO PETITION

Act of July 15, 1941, Amending Jurisdictional Act, — Stat. —

An Act

To amend the Act entitled "An Act conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any tribe or band thereof may have against the United States, and for other purposes", approved June 28, 1938

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 6 of the Act entitled "An Act conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any tribe or band thereof may have against the United States, and for other purposes", approved June 28, 1938, is hereby amended by striking out the words "anything in any other Acts of Congress to the contrary notwithstanding" and inserting in lieu thereof a period and the following: "Anything in any other Acts of Congress to the contrary notwithstanding"; by striking out "range 35" wherever it appears in such section and inserting in lieu thereof the following: "township 35 north"; by striking out the word "of" following the word "ownership" appearing in the first proviso of the said section; and by striking out the word "constitutent" in section 1 and inserting in lieu the word "constituent".

Approved, July 15, 1941.

[fols. 13-14] GENERAL TRAVERSE—Filed December 16, 1942

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the pettion be dismissed.

Norman M. Littell, Assistant Attorney General.

ARGUMENT AND SUBMISSION OF CASE

On February 5, 1946, the case was argued and submitted on merits by Mr. Ernest L. Wilkinson for plaintiffs and by Mr. Wilfred Hearn for defendant.

[fol. 15] **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whitaker, J.; Concurring opinion by Littleton, J.**—Filed March 4, 1946

Mr. Ernest L. Wilkinson for the plaintiff. Messrs. John W. Cragun and Francis M. Goodwin were on the brief.

Mr. Wilfred Hearn, with whom was Acting Assistant Attorney General J. Edward Williams, for the defendant. Messrs. George T. Stormont and Marvin J. Sonosky were on the brief.

The facts necessary to a decision of the case are set out in the opinion; they are set out more in detail in the following special findings of fact.

SPECIAL FINDINGS OF FACT

1. The petition in this case was filed pursuant to the jurisdictional act of June 28, 1938 (52 Stat. 1209), as amended by the act of July 15, 1941 (55 Stat. 593), which provided *inter alia* as follows:

> If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and * * * or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the court shall render judgment in favor [fol. 16] of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources, * * *

2. Plaintiffs are a confederation of the Uncompahgre (sometimes designated as Tabequache), White River (sometimes designated as Yampa and Grand River), Southern and Ute Mountain Ute (which at the time of the agreement

of March 6, 1880, hereinafter referred to, were jointly referred to as Southern Utes, and sometimes designated as Capote, Muache, and Weeminuche) Bands of Ute Indians.

3. Plaintiffs were parties to a treaty of March 2, 1868, with the United States (15 Stat. 619, 2 Kappler 990) whereby a reservation was established for them in what is now the State of Colorado, Article II of the treaty being as follows:

> The United States agree that the following district of country, to wit: commencing at that point on the southern boundary line of the Territory of Colorado where the meridian of longitude 107° west from Greenwich crosses the same; running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north latitude; thence due west to the western boundary line of said Territory; thence south with said western boundary line of said Territory to the southern boundary line of said Territory; thence east with said southern boundary line to the place of beginning, shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, except as herein otherwise provided.

By Article III of the Treaty, the Indians, parties thereto, relinquished "all claims and rights in and to any portion [fol. 17] of the United States or Territories, except such as are embraced in the limits defined in the preceding article."

4. By agreement of September 13, 1873, ratified by the Act of April 29, 1874 (c. 136, 18 Stat. 36), the Ute Indians ceded to the United States over three million acres of the reservation established by the treaty of March 2, 1868.

5. Article IV of the treaty of March 2, 1868, provided, in part, as follows:

> The United States agree to establish two agencies on the reservation provided for in article two, one for the Grand River, Yampa, and Uintah bands, on White River, and the other for the Tabequache Muache, Weeminuche, and Capote bands, on the Rio de los Pinos, on the reservation, * * *.

The agencies provided for in the treaty were established by the defendant during the latter part of 1869. The one for the Grand River, Yampa, and Uintah bands (northern agency) was established on White River in latitude 40°6′ north, and longitude 107°40′ west. It was thought to be south of the north boundary line of the reservation. With reference to the location of this White River Agency the United States Indian Agent, in his report of September 15, 1869, said:

> * * * White River at this point contains a great abundance of water for mill and irrigating purposes, it being about the size of Platte River at this place. There is plenty of good cottonwood timber along the stream, and pine in the mountains some six miles distant. The side valley and adjacent hills afford abundant pasturage for the stock of the agency and the Indians.
>
> Some years ago I explored White River from its mouth to its headwaters, and this is the best valley along its entire course. It is a warm valley, and stock will subsist the year round upon the pasturage. A better place could not be found in the northern part of the reservation, in my opinion. * * *

The other agency was established far to the south.

6. At or soon after the establishment of the White River (northern) Agency, some miners began working along Douglass Creek in Wyoming, considerably north of the White River Agency, and the Indians objected. In his report of [fol. 18] December 23, 1869, the Commissioner of Indian Affairs mentioned the incident as follows:

> * * * no difficulty having arisen during the past year, except with some miners on Douglass Creek,

whom they ordered off as trespassers upon their reservation, but who in fact were not, the land being fifty miles distant from the reserve; the matter being explained to the Indians, no further trouble is apprehended. * * *

Of the incident the Superintendent of Indian Affairs in his report of September 1, 1869, said:

> * * * Of the condition of affairs at the northern or White River agency, I have to report that on August 31, 1869, I received a letter from Hon. J. A. Campbell, governor of Wyoming Territory, stating that on the 25th day of August 1869, a deputation of the Utes visited the miners of Douglass Creek, Wyoming, and in North Park, Colorado, and notified them that two days would be given them in which to quit the "diggins," as by working these mines they were trespassing upon the lands set aside for the exclusive use of the Grand River and Uintah bands of Utes, by the treaty of 1868. In this assertion the Indians were mistaken, as the mines of Douglass Creek, Wyoming, and in North Park, Colorado, are not within fifty miles of the reservation.
>
> Immediately upon the receipt of Governor Campbell's letter, I dispatched Lieutenant Parry, with full instructions in the premises, a copy of which has been sent to your department; and when the Indians fully understand the matter, I believe there will be no further difficulty. * * *

In his report of September 10, 1874, the United States Indian Agent stated, with respect to the location of a proposed wagon road down the Bear River Valley, north of the White River Agency, as follows:

> * * * Soon after my arrival here, in July, the Indians requested to have a "talk" with me about a proposed wagon-road which is to pass down the Bear River Valley, which valley they claim as their country. I listened to their remonstrance against the opening of such a road, and at their request wrote to the Commissioner of Indian Affairs in regard to the matter. Upon my return to the agency in August, I read to them "in [fol. 19] council" the reply of the Commisisoner, which

was, in substance, that the Bear River country was not theirs and that they had no rights in it whatever. The Indians listened to me respectfully, and dispersed quietly, and I have heard nothing from them in regard to the matter since. It is much to be desired that the northern boundary of the reservation be accurately defined and made plain to the Indians by natural landmarks. I have heard some reports of their threatening to drive off persons who have and are making efforts to settle the Bear River Valley, but have not learned that they have resorted to any open violence.

In his report of June 21, 1875, the Indian Agent, E. H. Danforth, said:

At the persistent solicitation of all the principal Indians of this Agency, and to satisfy them, I write to request, in their name, that a few of their leading Chiefs, accompanied by their Agent, may be allowed to visit Washington this fall to consult with the authorities there in regard to subject of the northern boundary of this Reservation. I have endeavored to make them realize the expense attending such a journey and the improbability of their request being granted, but nothing would do, but I must write.

In regard to this matter, however, I would say, should the Commissioner deem it advisable, should there be money which might reasonably be expended for such a purpose, I think that such a visit and conference would be the means of correcting the misunderstanding which now appears to exist among the Indians here in regard to the conditions of the Treaty of 1868 determining the boundaries, northern and eastern of their Reservation, and would induce them to be more quiet and contented in the face of the present and proposed immigration of white settlers to the Bear River Valley.

I would state that I have done all in my power to make the Indians acknowledge that the country referred to does not belong to them. If I have talked a minute I have talked a hundred hours on the subject and so far as I can learn in the numerous councils which I have had with them most, if not all, the Indians here acknowledge and are living under the Treaty of 1864, and do not recognize the conditions of any other which

would [limit (?)] the extent of their territory—at least I can get no concession from them to that effect. I would say, however, that if the Indians here are really convinced that the white settlers on the Bear River [fol. 20] are trespassers on their lands they act with uncommon and commendable forebearance in the matter, doing no violence, and simply protesting that the whites do not do right to come there—with one exception to which I referred in my monthly report for May last. Of this Bear River matter and the complaint of Miss Smart, copies of which I have just received I address you in a special communication.

7. In October or November 1875, a survey (the first one ever made) of the north boundary of the reservation was completed by J. W. Miller, and from it it was ascertained that the north boundary of the reservation was south of White River nearly the entire length of the line, and that the buildings of the White River Agency were north of the line. This established the north boundary of the reservation at a location south of where the defendant's agents had thought, and far south of where the Indians had thought, the line ran.

In his report of October 21, 1875, Indian Agent, E. H. Danforth, said:

> In regard to making any authoritative statement to the Indians of my agency as to the exact location of the northern boundary of the Ute Reservation in Colorado I find myself in a very embarrassing situation. Upon receiving information that the contract for surveying said boundary had been awarded to Mr. J. W. Miller, and learning that the work could be prosecuted this season, I was in hopes that the matter would be quickly and finally settled, and that my duties in regard to informing the Indians of the extent and limits of their territory would be made plain to me.
>
> Mr. Miller has been at my agency; he has given me what information he could; he has talked with some of the leading Indians; and proceeds in the work of running a certain line which he had commenced to run before I saw him but still I know little more in regard to the main question than I knew last fall.

Mr. Miller came to the agency the 10th of October, and conferred with me and two of the leading Chiefs of the tribe; he stated that he was simply instructed to find a certain corner east of here which was supposed to be the northeast corner of the Ute Reservation in Col., and to run thence a line due west to the western boundary of the territory. Upon arriving at said N. E. corner he found it to be, as he thought, from fifteen to eighteen miles south of the position in which it was [fol. 21] supposed to be as established by the treaty of 1868. He informed me that he repeatedly so declared it to be to his assistants and members of his party before meeting me. Acting under instructions he had nothing to do but to run a line due west from said corner. Upon proceeding with the survey of said line it passed about one eighth (⅛) of a mile south of the agency buildings, cutting them all off. All the tillable land of this valley, all of the cattle range; in fact I may say all of the White River Valley;—all of the valley which the Utes have occupied as a home for years, which I and the agents preceding me have informed them was still theirs and would not be taken from them. I requested Mr. Miller to tell me in the presence of the Chiefs referred to whether he was running the northern boundary line of the Ute Reservation, and if not to state approximately where such boundary line would run. He informed me and the Indians that he was not running the boundary line and that their line would be found to run from 15 to 18 miles north of the agency building.

What Mr. Miller said agreed exactly with all that I had previously been able to learn from maps and other sources in the matter, and with what I had previously told the Indians when obliged to say something in reply to their persistent questioning.

A division of the U. S. Geological and Geographical Survey made their headquarters at this agency last season. In the party was a competent topographer, furnished with suitable instruments for correct observation. For my information he very kindly took such observation as enabled him to locate the 40th parallel of north latitude which he found to run by a certain flat top hill about a mile and a half north of the agency buildings. This I found to agree very nearly with the

information which I had received from the previous agent, who had in his turn been informed by a survey party that the before-mentioned boundary line which according to treaty lies 15 miles north of the 40° runs about eighteen (18) miles north of the agency.

I had refrained from talking much about the matter with the Indians, speaking only in a general way when questioned by them waiting for and depending upon the promised survey of Mr. J. W. Miller. He has now come and gone; has only confirmed my previous information; has not located the northern boundary; has felt authorized to inform me and certain of the Indians that the line he was running was not the northern boundary; [fol. 22] and also felt authorized to state to me and Indians that their boundary line was from 15 to 18 miles north of the agency. He stated also that upon his return he would advise the propriety of a new survey based upon new and accurate observation.

Under the circumstances I have thought it best to say as little as possible on the subject to the Indians before laying the matter before you.

It must be seen at once that after all the trouble which I have had in regard to this question within the last twelve months, continually putting off the Indians by informing them that Mr. Miller and authority from Washington would come this season and tell them just where their line was, that I now feel very much embarrassed.

I urge the propriety, the absolute necessity at the earliest practicable date of a new survey.

Should we nevertheless all be in the wrong, including the Government maps and should the position of the northeast corner as at present located, and the line just run by Mr. Miller be correct, and it be the purpose of the Department to adopt it, I wish to be informed at once, and be instructed as to my duties in the premises. In this event, however, it will be useless to attempt any more improvements here; the Indians will be driven from the only farming land and from the only stock range which I have as yet seen in this portion of the Reservation and obliged to make their home upon the river forty (40) miles south of here.

I respectfully ask an early answer to this letter.

8. On November 19, 1875, the Commissioner of Indian Affairs wrote to the Secretary of the Interior as follows:

> I am advised by H. B. Denman, Esq., Attorney for J. W. Miller, under date of the 17th instant, that the recent survey of the north boundary of the Ute Indian Reservation in Colorado Territory, made by Mr. Miller, under his contract with the General Land Office, develops the fact that the White River and surrounding valleys as well as the Agency buildings and improvements at the White River Agency lie north of the said boundary and consequently are not within the limits of the said Ute Reservation.
>
> In view of these facts I have the honor to recommend that the President be requested to issue an order withdrawing all that tract of country lying between the north boundary of the Ute reservation as defined in [fol. 23] treaty of March 2, 1868 (Stat. at L., vol. 15, p. 619) and the 1st standard parallel north and setting apart the same as an addition to the present Ute Indian Reservation.
>
> I enclose herewith a draft of such an order and a portion of the map of Colorado.

9. On November 20, 1875, the Secretary of the Interior made the following recommendation to the President:

> Concurring in the recommendation of the Commissioner of Indian Affairs, contained in the accompanying report, dated the 19th instant, I have the honor to request the signature of the President to the enclosed draft of an Executive Order, withdrawing from sale all that tract of country lying between the north boundary of the Ute Reservation, as defined in treaty of March 2, 1868, and the 1st standard parallel, north; and setting apart the same, as an addition to the present Ute Indian reservation in the Territory of Colorado.

10. On November 22, 1875, the President issued the following Executive Order:

> It is hereby ordered that the tract of country, in the Territory of Colorado lying within the following described boundaries, viz:
>
> "Commencing at the northeast corner of the present Ute Indian Reservation as defined in Treaty of March

2, 1868 (Stats. at Large, vol. 15, p. 619) thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said 1st standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian reservation, thence east with the north boundary of the said reservation to the place of beginning,"

be and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to their present reservation in said Territory.

11. On November 24, 1875, the Commissioner of Indian Affairs wrote to E. H. Danforth, the agent at the White River Agency, as follows:

Referring to your letter of the 21st ultimo, respecting the location of the north boundary of the Ute Indian [fol. 24] reservation in Colorado and the object of the recent survey made by Mr. John W. Miller, you are advised that Mr. Miller was authorized to make the survey in question and on its completion the facts in the case were promptly reported to the Department by H. B. Denman, Esq., attorney for Mr. Miller.

Upon the recommendation of this office an order was issued by the President on the 22nd instant (copy herewith) withdrawing from sale or entry all that tract of country lying between the north boundary of the Ute reservation as defined in treaty of March 2, 1868 (St. at Large, vol. 15, p. 619) and which was the boundary surveyed by Mr. Miller—and the 1st standard parallel north, and setting apart the same as an addition to the present Ute Indian reservation.

This action fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged.

I enclose for your information a portion of the map of Colorado showing the portion withdrawn as the addition to the reserve.

12. By an agreement between the plaintiffs and the United States of March 6, 1880, amended, ratified and confirmed by

the act of June 15, 1880 (21 Stat. 199; 1 Kappler 180), and thereafter ratified by the Indians, the plaintiff Indians sold their reservation to the United States, except certain lands retained by them for their own use, and the United States undertook to sell the lands not retained by the Indians, and, after certain stipulated payments, to deposit the proceeds in the Treasury of the United States for the benefit of the Indians. By section 3 (21 Stat. 203, 204) it was provided that certain allotments in severalty should be made to plaintiffs and that:

> * * * all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, [fol. 25] shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: * * *

The preamble to the said act of June 15, 1880 (21 Stat. 199) was in part as follows:

> Whereas certain of the chiefs and headmen of the confederated bands of the Ute tribe of Indians, now present in the city of Washington, have agreed upon and submitted to the Secretary of the Interior an agree-

ment for the sale to the United States of their present reservation in the State of Colorado, their settlement upon lands in severalty, and for other purposes; * * *

The original offer or agreement (21 Stat. 200) had also provided that:

> The said chiefs and headmen of the confederated bands of Utes also agree and promise to use their best endeavors with their people to procure their consent to cede to the United States all of the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.

13. By Sections 1 and 2 of the act of July 28, 1882 (22 Stat. 178; 1 Kappler 205) it was provided:

> That all of that portion of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Utes be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after the passage of this act, in accordance with the provisions and under the restrictions and limitations of section three of the act of Congress approved June fifteenth, eighteen [fol. 26] hundred and eighty, chapter two hundred and twenty-three, except as hereinafter provided, under regulations to be prescribed by the Secretary of the Interior in accordance with the provisions of this act.
>
> Sec. 2. That the Secretary of the Interior shall, at the earliest practicable day, ascertain and establish the line between the land mentioned in section one of this act and that now or lately occupied by the Southern Utes in said State; and * * *

The above Act was passed merely to remove the doubts which some settlers had as to their right to make entry and obtain patents.

14. On August 2, 1882, the Commissioner of Indian Affairs made the following recommendation to the Secretary of the Interior:

> Referring to the act of Congress, approved July 28, 1882, declaring the lands lately occupied by the Un-

> compahgre and White River Ute Indians, in Colorado, to be public lands of the United States, etc., I have the honor to recommend that the lands set aside by Executive Order of November 22, 1875, for the use of the several tribes of Ute Indians, be restored to the public domain.
>
> . . . . . .
>
> I enclose a draft of an Executive Order for the purposes herein indicated, and respectfully recommend that the same be laid before the President for his signature.

15. On August 4, 1882, the following Executive Order was issued:

> It is hereby ordered that the following described tract of country in Colorado, viz: "Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868, (Stats. at Large, vol. 15, p. 619), thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning," withdrawn from sale and set apart for the use of the several tribes of Ute Indians by Executive Order dated November 22, 1875, be, and the same hereby is restored to the public domain. . . .

[fol. 27] 16. The lands restored to the public domain by the Executive Order quoted in finding 15 were opened to entry as public lands of the United States, and the moneys received from the sale thereof were deposited in the Treasury of the United States to the credit of the fund "Sales of Public Lands," and were not credited, or accounted for, to the Indians.

17. By the Act of March 3, 1909 (c. 263, 35 Stat. 781, 788-789), Congress, in order to carry into effect the agreement ratified by the Act of June 15, 1880 (c. 223, 21 Stat. 199), conferred power on the Court to hear, determine, and render final judgment on the "claims and rights" of the

Ute Indians (plaintiffs in this case) under that agreement "including the value of all lands ceded by the said Indians which have been set apart and reserved from the public lands as public reservations * * *." Pursuant to the jurisdiction so conferred, the same plaintiffs now in suit instituted an action seeking recovery for the failure of the United States to dispose of the lands ceded by the agreement of 1880, for an accounting for the lands sold, and to recover compensation for the lands reserved by the United States for public purposes. The plaintiffs recovered a judgment for the proceeds of the cash sales of the land sold, plus the value of land reserved for public purposes, less offsets and deductions. None of those lands lay north of the true north boundary of the reservation as described in the treaty of March 2, 1868 (15 Stat. 619). A supplemental judgment included additional sums received by the defendant up to July 1, 1910.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and their petition is, therefore, dismissed.

Opinion

Whitaker, *Judge*, delivered the opinion of the court:

The issue in this case is over the defendant's liability to account for the sale of certain lands added to plaintiffs' reservation by Executive Order.

[fol. 28] On March 2, 1868, the parties entered into a treaty under the terms of which the plaintiffs ceded to the defendant all the lands to which they laid claim, except those in the southwest section of the present State of Colorado. The lands reserved were bounded on the east by the 107th parallel of west longitude, on the south by the southern boundary of the State of Colorado, on the west by the western boundary of that State, and on the north by a line drawn due east from the western boundary beginning at a point 15 miles north of the 45th parallel of north latitude.

Not until more than seven years later was any attempt made to designate on the ground the northern boundary;

but in the meantime the defendant, pursuant to the treaty, established an agency on the White River at a place it thought was south of the northern boundary line of the reservation. The Indians believed that the northern boundary was far to the north of the location of this agency; and so, when some miners began working on Douglass Creek in Wyoming, they protested, because they said this was within the limits of their reservation. Later, they protested the location of a wagon road north of the White River agency, because they said this was within the limits of their reservation.

When in 1875 a survey showed that the northern boundary was south of this agency the Indians manifested considerable dissatisfaction. In order to pacify them, the President, on the recommendation of the Commissioner of Indian Affairs and the Secretary of the Interior, by Executive Order in 1875, withdrew from sale and set apart for the use of the plaintiff tribe certain lands north of the northern boundary "as an addition to the present reservation in said territory." "This action," the Commissioner of Indian Affairs wrote to the Indian Agent, "fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged."

In September 1879 some of the White River Utes massacred the Indian Agent and all the agency's male employees and others, and ambushed and killed a small detachment of soldiers. The chiefs and headmen of the [fol. 29] tribe were summoned to Washington for the purpose of bringing about the apprehension of the guilty parties and of securing an agreement from them for the cession of their reservation. An agreement was secured to cede to the United States all of their reservation, except certain lands that were to be allotted to them in severalty. All the lands not allotted in severalty the defendant agreed to sell for the account of the Indians. This agreement was ratified by Congress on June 15, 1880 (21 Stat. 199).

The question presented is whether or not there was included in the lands to be sold for the account of the Indians those lands which were added to the reservation by Executive Order in 1875.

The parties agree that the Indians secured no title to these lands by virtue of the Executive Order alone,[1] but plaintiffs say that the President's action in adding them to the reservation was ratified by Congress by the Act of June 15, 1880. Plaintiffs say that in the preamble to this Act it is recited that the chiefs and headmen of the confederated bands of the Ute Tribe of Indians had agreed upon a sale to the United States "of their *present* reservation in the State of Colorado," (italics ours) and that the agreement itself recites that the chiefs and headmen agreed to use their best efforts to get their people to consent to the cession to the United States of "all the territory of the *present* Ute Reservation in Colorado." They say that at the time the chiefs and headmen entered into this agreement they believed that the lands added to their reservation by Executive Order were legally a part of their reservation and that, therefore, it is evident that it was their intention to convey these lands to the United States, as well as their other lands, and, therefore, it follows that they understood that the United States was agreeing to sell for their account these lands along with their other lands.

In all probability this is true. The Indians were no doubt ignorant of the legal requirements for vesting title in them to a part of the public lands, and so, when they were informed by the Indian Agent that these lands had been added to their reservation, they in all probability believed that [fol. 30] they were as much a part of their reservation as were the lands set aside by the treaty of March 2, 1868. So, when these chiefs and headmen entered into the agreement ratified by the Act of June 15, 1880, they no doubt believed that they were ceding to the United States these lands as well as others.

However, the essential thing in order to charge the United States is that it should have agreed to sell these lands for the account of the Indians. If it did not, it is not liable for not having done so, whatever the Indians may have thought it had agreed to do.

The agreement of the United States is set forth in the Act of June 15, 1880. That Act in its preamble says that the chiefs and headmen of the Ute Tribe had presented an agreement to the Secretary of the Interior, and that the

---

[1] *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317.

President had submitted the agreement to Congress "for acceptance and ratification." Congress ratified it with certain provisos not material here. The agreement, which is set out in full in the Act, provided for a cession of the Ute reservation to the United States in consideration of which the United States agreed to do certain things which were enumerated. These were to make certain allotments, to pay a certain amount of annuities, to provide agricultural lands and farming equipment, to educate their children, and to continue in force the treaty of 1868 and the agreement which was ratified by the Act of April 29, 1874. Nothing was said in the agreement about a sale of the ceded lands for the Indians' benefit, but Congress added an agreement to that effect in section 3 of the Act of June 15, 1880. This reads in part:

> * * * and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States, and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this Act: * * *.

The Act then proceeds to set forth what shall be done with the money derived from the sale of the lands.

[fol. 31] It will thus be seen that the United States agreed to sell for the account of the Indians only those unallotted lands "the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States." This did not include the lands added to the reservation by Executive Order because the Indians did not have title to these lands and, hence, title to them was not conveyed by the agreement referred to. The United States agreed to sell for the account of the Indians only those lands the title to which was conveyed to them by this agreement.

At the time Congress ratified this agreement, it must have known of the addition to the reservation by Executive Order and, hence, purposely, it limited its agreement to sell the Indians' lands for their account to those lands the title to which was conveyed by the agreement. It evidently meant

to exclude the lands the Indians had been occupying under the Executive Order, but to which they had no title.

The Indians proposed to cede their "present reservation"; Congress knew they probably considered these Executive Order lands a part of their "present reservation," and so it was careful to limit its agreement to sell for the Indians' account those lands to which the Indians had title. It did not mean to ratify and confirm the President's action in setting apart these lands "as an addition to their present reservation in said Territory," and it plainly said so.

Whether this was explained to the Indians we do not know, but it is plain that Congress did not intend to agree that these Executive Order lands should be sold for the Indians' account, and, in the absence of such an agreement, the defendant is not liable for not having done so.

The parties charged with carrying out the Act so construed it. On August 2, 1882, the Commissioner of Indian Affairs recommended to the Secretary of the Interior, "that the lands set aside by Executive Order of November 22, 1875, for the use of the several tribes of Ute Indians, be restored to the public domain." This was done by Executive Order on August 4, 1882. Had the Commissioner and the Secretary of the Interior and the President believed that Congress had intended by the Act of June 15, 1880 to vest [fol. 32] title in the Indians to these Executive Order lands and had agreed that these lands should be sold for the account of the Indians, they would not have withdrawn them from the reservation and restored them to the public domain.

We are clearly of the opinion that the Indians never did acquire title to these Executive Order lands and that the Congress never did agree to sell them for the account of the Indians.

The view we take on the merits makes it unnecessary for us to consider the other defenses raised by the defendant.

Plaintiffs' petition will be dismissed. It is so ordered.

Jones, Judge, and Whaley, Chief Justice, concur.

Concurring Opinion

Littleton, Judge, concurring:

I concur in the decision that plaintiff bands (hereinafter sometimes referred to as plaintiff) are not legally entitled

to recover compensation as for a taking of the rectangular strip of land in controversy. This land is situated between the first standard parallel north and a line running due west from a point on the 107th meridian fifteen miles due north of where said meridian crosses the fortieth parallel of north latitude. Plaintiff insists that when the treaty of March 2, 1868, was made and ratified it was believed and intended by the parties that this disputed area of land was included within the reservation as defined by the treaty of March 2, 1868, 15 Stat. 619. The strip of land in question is approximately three miles wide and about one hundred and eight miles long.

I do not understand from plaintiff's brief and oral argument that it is agreed that the Ute Indians did not acquire Indian title to this land by virtue of the treaty and the Executive Order of November 22, 1875, quoted in finding 10.

What plaintiff concedes is that where a treaty did not intend to give possessory Indian title and where the President by Executive Order simply withdraws public land belonging to the United States from entry or sale under the land laws of the United States and reserves it for Indian purposes as a part of a reservation, such as was done in the case of the *Sioux Tribe of Indians* v. *United States*, 316 U. S. [fol. 33] 317, the Indians do not acquire thereby an exclusive use and occupancy Indian title as against the United States. However, plaintiff's claim of exclusive use and occupancy title against the United States to the strip of land here in controversy is grounded upon the claim by the Ute Indians that the parties to the treaty of 1868 intended by art. 2 thereof that an east and west line from "a point fifteen miles due north of where said meridian [107° of longitude west from Greenwich] intersects the fortieth parallel of the north latitude" should include this controverted strip of land in the reservation because it was, for the most part, in the White River Valley, which valley the Indians desired to retain and which the Government intended they should have. In other words, plaintiff bands contend that they understood and intended that the point fifteen miles due north of where the 107th meridian intersects the fortieth parallel was farther north than where that point was finally, many years later, found to be. The true north boundary line of the reservation was not surveyed and established prior to the cession agreement of March 6, 1880.

Plaintiff insists that by reason of this situation and the controversy which had existed up to the date of the Executive Order as to the intended location of the true north boundary line under the 1868 treaty, the protests of the White River Ute Indians prior to and in October 1875, when J. W. Miller made a survey in October 1875 of an east-west line from a point on the 107th meridian near the fortieth parallel of north latitude to the western boundary line of the Ute Reservation, and the letters written by the Indian Agent at the White River Agency, the President by said Executive Order of November 22, 1875, settled the dispute as to the correct north boundary line of the reservation and included the strip of land in controversy as a part of the reservation, as intended by the treaty.

Plaintiff contends that from and after the date of the Executive Order in 1875 the tribe understood and claimed, as it had theretofore understood and claimed, that the true north line of the reservation as intended in art. 2 of the treaty of 1868 included the land in question in the reservation as stated in the Executive Order and that after the issuance of the Executive Order no controversy as to the north boundary line of the reservation existed between the parties. [fol. 34] Plaintiff further insists that since the land in controversy was thus regarded and intended by both parties to be a part of the treaty reservation belonging to plaintiff tribe they understood and intended that such land was to be included in the territory to be released and ceded by the cession agreement of March 6, 1880, in which the Indians agreed to release and cede "to the United States all the territory of the present Ute Reservation in Colorado."

Plaintiff therefore claims that when Congress by the act of June 15, 1880, 21 Stat. 199-205, accepted and ratified this agreement without material change, describing it in said act as "an agreement for the sale to the United States of their present reservation in the State of Colorado," and in enacting certain provisions in said act for carrying out said agreement, which act was submitted to, accepted, and ratified by the Ute Tribe, as required by sec. 10 of said act, the Congress accepted and ratified the intention and understanding of plaintiff and the United States as to the true north boundary line of the reservation under the treaty of 1868 as expressed and established in said Executive Order of November 22, 1875.

For the reasons stated plaintiff bands take the position that they acquired and had under the treaty and the Executive Order, and when the agreement of 1880 was made and ratified, exclusive use and occupancy title to the land in controversy and became entitled under sec. 3 of said ratification act of June 15, 1880, which they accepted, to the proceeds from the sale of this strip of land, as from the sale of other land of the reservation after the reimbursements to the United States, as mentioned therein.

In addition to the official correspondence quoted in the findings, the following letters taken from Senate Executive Document No. 29, January 7, 1880, 46th Congress, 2d Session, pp. 41-45, are pertinent:

White River Indian Agency,
White River, Colo., May 7, 1877.

SIR:

I have to advise you that the matter of the coming in upon the Ute Reservation by white persons to settle and to prospect for gold is being agitated by some parties in the country about.

[fol. 35] The very unfortunate mistakes made by Mr. Miller in his *intended* survey of the northern boundary of the Ute Reserve has led to much talk and discussion as to the rights of the Ute Indians to the White River Valley. It is due to the Indians of this reserve, and to the quiet and well being of the white settlements near, that this agitation should cease; that the mistake made by Mr. Miller should be officially rectified by authorities in the Land Office; that correct maps indicating the true position of the northern boundary of the Ute Reserve in Colorado should be circulated, sent for distribution to Denver, Middle Park, and to other places.

The treaty plainly states that the northern boundary shall be a line fifteen miles north of the fortieth parallel of latitude. All the authorities of the "Hayden Survey," and of all maps which I have seen, place the fortieth parallel about two miles north of the location of this agency. Mr. Miller ran his line for the northern boundary one-half a mile south of this agency, making a mistake of about seventeen and a half miles.

I ask whether I will be supported if I endeavor to remove persons coming upon the reserve to settle or to

"prospect"; and where I am to look for assistance to do so.

Very respectfully, your obedient servant, E. H. Danforth, United States Indian Agent.

Hon. J. Q. Smith, Commissioner of Indian Affairs, Washington, D. C.

Department of the Interior,
Office of Indian Affairs,
Washington, May 23, 1877.

SIR:

Respecting the question of the occupancy of the White River Valley, in the northern portion of the Ute Reservation in Colorado, referred to in your letter of the 7th instant, you are advised that any person settling upon lands in Colorado south of the first standard parallel between the 107th degree of west longitude and the west boundary of Colorado since the 22d of November 1875, is there in violation of law, and subject to removal under sections 2147 to 2151, both inclusive, of the Revised Statutes. If a removal is deemed necessary, you will report the facts to this office that proper action may be taken in the premises.

The question of the right of occupancy is not affected by the accuracy of Mr. James W. Miller's survey. That question is settled by an executive order, dated Novem-[fol. 36] ber 22, 1875, whereby all the land between the 107th degree of west longitude and the western boundary of the State, as far north as the first standard parallel, was withdrawn from settlement and set apart as an addition to the Ute Reserve.

The first standard parallel has been surveyed and its location properly marked by regulation mounds or monuments, and is at least 25 miles north of the agency buildings.

I send you, for the files of your office, another copy of said executive order with copy of office letter of November 24, 1875, transmitting a copy thereof.

Very respectfully, S. A. Galpin, Acting Commissioner.

E. H. Danforth, Esq., United States Indian Agent, White River Agency, Colorado.

In replying to the letter of the Commissioner of May 23, Agent Danforth on June 11, 1877, wrote the Commissioner, in part, as follows:

White River Indian Agency,
White River, Colo., June 11, 1877.

SIR:

I am in receipt of your letter of the 23d of May, in reply to my letter of May 7, asking for instructions as to the course I should pursue in case parties make an effort to settle in the northern portion of the Ute Reserve near my agency.

* * * * * * *

The Utes fully believe that they have been deprived, unjustly, of part of their lands in the southern portion of their reserve, and from what I have been able to learn on the subject, I think the facts in the case justify their belief and the correctness of their statement that white settlers are at present occupying and farming their land. From what I see of the disposition and wishes of the white people in the neighborhood of the northern portion of the reservation, they would gladly deprive the Utes of this country, and that they are preparing to take the first steps to accomplish it I am satisfied. Efforts are being made to raise colonies to settle in the White River Valley; one party of about sixty families is reported *en route*. I have a letter from the leader of another party, asking me for information and directions.

There is already one party upon the reserve, hunting and prospecting for gold. The settlers of the neighbor- [fol. 37] ing valleys are loud in their talk that they have a perfect right to come and settle here, and are proposing to do so. Much of this discussion has arisen, as I said before, no doubt, from the mistakes of the Miller survey. It continually comes to me that members of this party were very free in declaring in their progress through the country that this agency was off the reservation, and the entire White River Valley was not Indian country. I repeat here, most decidedly, that it is the duty of the Indian Office, through the Land Office, or in some other way, to publish *very widely* throughout Colorado, and very soon, too, the true

boundaries of this reservation, and to circulate correct maps indicating the same to the eye. A little care taken *now* in this direction will save a great deal of trouble to Indians and whites, and to the authorities of the country in future.

* * * * * * *

Very respectfully, your obedient servant, E. H. Danforth, United States Indian Agent.

Hon. J. Q. Smith, Commissioner of Indian Affairs, Washington, D. C.

Thereafter, on July 5, 1877, the Commissioner of Indian Affairs wrote the Secretary of the Interior in part, as follows:

SIR:

I have the honor to submit herewith, for your consideration and instruction, copy of a letter of the 11th ultimo from E. H. Danforth, United States Indian agent for the White River Ute Reservation in Colorado, complaining of the defiant intrusion of unauthorized white persons upon the northern portion of said reservation, particularly the White River Valley, and of his inability to effectually check or control them.

There is no military post near said agency, and it is not, therefore, practicable for the agent to obtain the aid of troops upon his own application, and without such assistance he is helpless to prevent the disregard of the territorial rights of said Indians by the intruders in question. The Utes are well known as a brave and warlike tribe, and, although now entirely peaceful, the danger as well as injustice of permitting a flagrant violation of their clear treaty rights is very evident.

The pretext and only possible color of excuse for the intrusion complained of is found in the Miller survey of the northern boundary of said reservation, executed in 1874, which delineated said boundary as south of the [fol. 38] fortieth parallel of north latitude, instead of fifteen miles north thereof, as provided by treaty of March 2, 1868 (15 Stats., 619), and clearly defined by Hayden's geographical survey of that region, which latter survey was based upon observations of latitude and longitude and seems to conform strictly to the treaty.

Prior to the Miller survey the Indians were in undisputed possession of the White River Valley as an unquestioned portion of their reservation, but thereafter, and under color thereof, the whites began the encroachments which have at last obtained such magnitude as to demand early attention. In this connection I respectfully recommend that steps be taken to secure a resurvey in lieu of that executed by Miller, so as to conform to the boundaries defined in the treaty, and thereby remove all possible pretense for unauthorized intrusion upon the reservation. It is recommended, however, that the General Land Office be directed to instruct the register and receiver of the proper district to give public notice that all lands withdrawn by said executive order are reserved as Indian lands, and are not, therefore, regarded as a part of the public domain for any purpose whatever, and that white settlers thereon are trespassers, and will be removed by the government, with the aid of the military, if necessary.

* * * * * * *

In view of all the circumstances and the grave public interests involved, it is suggested that it may be advisable to submit the matter to the President, with the recommendation that a military force be sent to the White River Valley to insure the faithful observance of the treaty stipulations with the Utes, by removing and keeping away from their reservation all unauthorized persons.

From a study of the record in connection with plaintiff's contentions as to the intention of the treaty of 1868, the Executive Order of November 22, 1875, and the ratification act of June 15, 1880, I am led to the conclusion that the Executive Order of November 22 was not issued and was not intended, in the circumstances disclosed, to settle a controversy as to the true north boundary line of the Ute Reservation, as intended by art. 2 of the treaty of 1868. In other words, I think the record does not show that in issuing this Executive Order the Government was interpreting art. 2 of the treaty for the purpose of fixing the first standard [fol. 39] parallel north as the true north boundary line of the reservation as intended by art. 2 of the treaty of 1868. The language of the Executive Order of November 22 con-

tains the usual language employed in such Executive Orders where public lands are withdrawn from sale and set apart for temporary use for Indian purposes. The language used in the Executive Order of November 22 is the same, or substantially the same, as the language contained in the Executive Order involved in the case of the *Sioux Tribe of Indians* v. *United States*, *supra*. When the agreement of March 6, 1880, was negotiated and made in Washington by the Secretary of the Interior with the chiefs and headmen of plaintiff bands, in which these Indians agreed to use their best efforts to procure the consent of the Ute Indians to cede to the United States "All the territory of their present Ute Reservation in Colorado," and when the Congress accepted and ratified that agreement and provided, in section 3 of the act, for the sale of the ceded lands, it was understood and intended, at least so far as the Government was concerned, that the lands being ceded, and which would be sold for the benefit of the Indians, were those lands of the Ute Reservation as defined by art. 2 of the treaty of March 2, 1868, *supra*, less the part of such reservation in the southern portion thereof which had previously been ceded or sold to the United States under an agreement of September 13, 1873, ratified April 29, 1874, 18 Stat. 36. See Senate Executive Doc., No. 114, March 10, 1880, 46th Cong., 2nd sess.; House Report No. 1401, May 11, 1880, 46th Cong., 2nd sess.

I am unable to find in the record sufficient evidence to support the conclusion that when the Indians made the agreement on March 6, 1880, and thereafter formally accepted the ratification thereof by Congress it was the clear understanding and intention of the parties that the reservation being ceded included any land other than the territory embraced within the north boundary line as specifically defined by art. 2 of the treaty of 1868.

Since, as I have stated above, the President did not, in my opinion, intend by the Executive Order of November 22, 1875, to interpret the treaty and to fix the correct location of the true north boundary line of the reservation at a place other than that called for by the specific language of the treaty, [fol. 40] and since the language of the Executive Order and the circumstances under which it was issued did not justify the Indians in believing that the President was interpreting the treaty and establishing the true north boundary line under the treaty, the plaintiff bands are not legally entitled to recover in this case.

The facts as disclosed by the official correspondence before and after the date of the Executive Order of November 22, 1875, with reference to the relations and dealings between the Government and the Indians of plaintiff bands in the north portion of the Ute Reservation indicate that the purpose and reason for the issuance of the Executive Order of November 22, 1875, was to withdraw from public entry or sale such an area of land at the north end of the Ute Reservation for temporary use for Indian purposes as would enable the Indian Agent at the White River Agency to keep white gold prospectors and settlers from intruding upon the Ute Reservation as defined by the treaty of 1868.

In his letter of May 7, 1877, *supra*, the agent at the White River Agency complained about intrusion upon the Ute Reservation by white settlers and gold prospectors and stated that the line, as surveyed by J. W. Miller, was about seventeen and a half miles south of the true north boundary line of the treaty, fifteen miles north of the fortieth parallel latitude. In his report of May 23, 1877, the Commissioner of Indian Affairs pointed out that the first standard parallel had been surveyed and its location properly marked, and that the area encompassed in the Executive Order for occupancy by the Indians was at least twenty-five miles north of the agency buildings.

The above conclusion that the Executive Order of November 22, the language of the agreement of 1880, and its ratification by Congress, did not vest in plaintiff bands exclusive use and occupancy title to the strip of land in controversy is supported by reference to an Executive Order issued by the President August 17, 1876, with reference to a boundary dispute which arose under the terms of the agreement of September 13, 1873, approved April 29, 1874, *supra*, in which the President did, on behalf of the United States, interpret the treaty and exclude from the cession certain land which, [fols. 41-42] according to the lines specified in the agreement, would have been included in such cession. This Executive Order was as follows:

> It is hereby ordered that all that portion of country in the State of Colorado lying within the following-described boundaries and forming a part of the Uncompahgre Park, namely, commencing at the fifty-third mile-post on the north line of the survey of the boundaries of the Ute cession, executed by J. W. Miller in 1875; thence south four miles; thence east four miles; thence

north four miles to the said north line; thence west to the place of beginning, be, and the same hereby is, withdrawn from the public domain, and set apart as a part of the Ute Indian reservation, in accordance with the first article of an agreement made with said Indians, and ratified by Congress April 29, 1874. (Stats. at Large, vol. 18, p. 36.)

For the reasons stated, I concur in the decision dismissing the petition.

MADDEN, Judge, took no part in the decision of this case.

[fols. 43-44] JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of March, A. D., 1946, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law, that plaintiffs are not entitled to recover.

It is therefore adjudged and ordered that plaintiffs' petition be and the same is hereby dismissed.

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on Cover: Enter John W. Cragun. File No. 51,004. Court of Claims. Term No. 1301. The Confederated Bands of Ute Indians, Petitioners, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed June 3, 1946. Term No. 1301 O. T. 1945.

[fol. 46] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 141

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.